RECENT CASES.

ADMISSION OF WOMEN TO PRACTISE AT THE BAR. — Under the common-law and the statutes of New Hampshire a woman may be licensed to practise as an attorney. *In re Ricker*, 29 Atl. Rep. 559 (N. H.). This decision places New Hampshire in accord with the majority of American jurisdictions in this matter. While the English courts have not as yet seen their way to admitting a woman to practise at the bar, the old common-law doctrine has been superseded very largely in this country, sometimes by statutory construction, as in Connecticut, *Hall's Case*, 50 Conn. 131, sometimes by direct enactment, as in Massachusetts, R. S. of Mass. 1882, c. 139. The objections to allowing a woman to practise, when she could plead coverture to any suit by a client on express or implied contract, are obvious; but now that she is almost universally liable on her separate contracts, there seems to be no legal reason why she should not assume the duties and responsibilities of the office.

AGENCY — MASTER AND SERVANT — SERVANT NOT UNDER CONTROL OF MASTER. — Action for injuries caused by negligence in the operation of an engine belonging to defendants, but which, together with its crew, at the time of the accident, was rented to and under the control of another company. *Held*, that defendants were not responsible. *Byrne* v. *Kansas City &c. R. Co.*, 61 Fed. Rep. 605.

The case follows the nearly universal rule of law on this point. *Rourke* v. *Colliery Co.*, 2 C. P. Div. 205; *Donovan* v. *Construction Syndicate*, 1 Q. B. [1893] 629; *Miller* v. *R. R. Co.*, 76 Iowa, 655. A different rule, however, prevails in Mississippi and Texas. *R. R. Co.* v. *Norwood*, 62 Miss. 565; *Burton* v. *R. R. Co.*, 61 Tex. 526. As the court point out, however, in the opinion in the principal case, this latter rule is due to a fallure to distinguish between such cases as the one under consideration and the carriage cases. *Laugher* v. *Pointer*, 5 Barn. & C. 547, and *Quarman* v. *Burnett*, 6 M. & W. 499.

AGENCY — VICE-PRINCIPAL — FELLOW-SERVANT. — Plaintiff, while in defendant's employ as a hod-carrier, was injured by the collapse of a scaffold upon which he was required to work. This scaffold had been erected by a carpenter employed by defendant for this purpose, and it was through his negligent construction of it that the accident happened. *Held*, that the carpenter, being a vice-principal and not a fellow-servant, defendant was responsible for his negligence. *McNamara* v. *McDonough*, 36 Pac. Rep. 941 (Cal.).

In this case we find another instance of the inaccurate use of the term "vice-principal." Here defendant was under an absolute duty to furnish suitable appliances, which he could not escape by delegating. But if plaintiff had been injured by some personal negligence of the carpenter while constructing the scaffold, it would certainly be held the negligence of a fellow-servant, for which defendant would not be liable. On the other hand, an employer is liable for all the negligence of a vice-principal, as if it were his own, in jurisdictions where the real vice-principal doctrine prevails.

COMMON CARRIER — NEGLIGENCE — CONTRACT TO RELIEVE FROM LIABILITY IN THE TRANSPORTATION OF LIVE STOCK. — Where a contract for the shipment of cattle provides that the shipper shall care for them on the journey, and relieves the carrier from all liability except for negligence, *held*, an unreasonable delay in transportation exonerates the shipper from all further care, and the carrier must feed and water them thereafter. *Ft. Worth & D. C. Ry. Co.* v. *Daggett et al.*, 27 S. W. Rep. 186 (Tex.). The decision of the majority seems questionable on the facts recorded. The authorities on which they base their opinions, Lawson on Carriers, § 191, and *Kenny* v. *Railway*, 59 Barb. 104, are cases of wilful malfeasance by the carrier involving delay in transportation which does not appear in the main case. It does appear that the accompanying drover had ample opportunity to care for the cattle after the accident occurred, but thought it was unnecessary. Granted that the drover is not guilty of contributory negligence, it seems unwarranted to hold the carrier for the mistaken opinion of a drover in regard to the needs of his stock. The rule of avoidable consequence also would seem to deny the right of a drover wholly to abandon cattle in case of undue delay, when it is apparent that this will greatly increase the amount of damages, while they can be cared for by himself with small expenditure of time and money.

CONSTITUTIONAL LAW — DISPENSARY ACT. — Act of December 24, 1892, forbidding the sale of liquors within the State by private individuals, and vesting the right to sell liquors exclusively in the State by certain designated officers and agents, the profits to

go to the State, *held* void as in violation of the State Constitution, since (1) it prevents the citizens of the State from carrying on a lawful trade, which can be done by the State only in the exercise of its police power. The Act in question is not a police regulation of business, since it is not intended to prohibit the sale of liquor, but to give the State a monopoly for the purpose of revenue; (2) a statute which embarks the State in trade is not within the legislative power conferred on the Assembly by the Constitution (Pope, J. *dissenting*). *McCullough et al* v. *Brown et al., County Board*, 19 S. E. Rep. 459 (So. Car.).

The dissenting justice takes the ground that the purpose of the statute is to regulate the sale of liquor, by providing that it be puré, that it be sold only on a written order, to one known to the seller, and in sealed packages, and not to raise revenue. He considers the Act, therefore, a proper use of the police power.

It is interesting to note that, since this decision, the South Carolina Court has declared an Act ostensibly differing from the one in question, but substantially the same, constitutional. This is due to the fact that Gary, J., a Tillmanite, has succeeded McGowan, J. Pope's dissenting opinion becomes the opinion of the court. The judges who held the former Act unconstitutional, of course, dissent. The decision has not yet appeared in the reports.

CONSTITUTIONAL LAW — EXCESSIVE DAMAGES — REMITTITUR. — *Held*, by a divided court, that when the court has reached the conclusion that, in an action at law, the damages allowed were excessive, it may designate the excess and cut down the verdict by remittitur. *Burdict* v. *Missouri Pac. Ry. Co.*, 27 S. W. Rep. 453 (Mo.).

The authorities upon this question are in conflict, but the present decision is in line with the majority of the American decisions.

The dissenting judges held that the question of damages is purely one of fact within the province of the jury, and for a court to substitute its verdict in any particular for that of the jury, violates the provision of the Constitution declaring the right of trial by jury invlolate. This would seem to be the correct view, for, as is said in the dissenting opinions, if the court may pare down the damages when it thinks they are excessive, why may it not increase the damages when it thinks they are too small, or why may it not change the verdict in any other respect it sees fit, and constitute itself judge of fact in place of the jury?

CONSTITUTIONAL LAW — INTERSTATE COMMERCE ACT — COMPULSORY SELF-INCRIMINATION. — In a proceeding against certain carriers, based upon the Interstate Commerce Act, defendant refused to testify, on the ground that the evidence would tend to criminate him personally. An Act of Congress, passed February 11, 1893, provides, in substance, that no person shall be excused from testifying in proceedings based upon the Interstate Commerce Act, on the ground that the same may tend to criminate him; but that no person so testifying shall be prosecuted on account of any transaction concerning which he may testify. *Held*, that the protection afforded by this Act was not co-extensive with the immunity granted by the Fifth Amendment of the Constitution, and hence defendants could not be forced to testify. *United States* v. *James*, 60 Fed. Rep. 257.

This case goes a long step farther than *Counselman* v. *Hitchcock*, 142 U. S. 547, and holds that the Fifth Amendment not only protects a witness from the pains and penalties resulting from self incrimination, but also from the ignominy and disgrace, and that therefore no immunity granted by statute which compels a witness to criminate himself can be co-extensive with the immunity granted by the Constitution. This is a step that has never been taken before. A witness has never been protected from testifying because it would injure his reputation, and it could hardly be supposed that the Constitution meant to afford a witness any such novel immunity. Would it not be preferable, then, to look at the spirit rather than the letter of the Amendment, and so prevent an immunity from serving as a screen for lawbreakers? See 5 HARVARD LAW REVIEW, 24.

CONSTITUTIONAL LAW — POLICE POWER — GRAIN ELEVATORS. — A statute of North Dakota declared all grain elevators in the State, operated for profit, to be public warehouses, prescribed maximum rates for storage, and provided that the grain should be kept insured at the expense of the warehouseman. The plaintiff in error owned and operated a grain elevator for the exclusive purpose of purchasing grain to fill contracts of sale, but incidentally as his business would permit stored grain for others. While his elevator was only partly occupied he refused to receive the relator's wheat at the statutory charges because doing so would interfere with his own business, which he had a right to protect under Article 1, sec. 8, and the Fourteenth Amendment of the U. S. Constitution. *Held*, all the provisions of the statute were within the legitimate sphere of the legislative power of the State. *Brass* v. *State of N. D., ex rel. Stoeser*, 14 Sup. Ct. Rep. 857.

Munn v. *Ill.*, 94 U. S. 113, and *Budd* v. *New York*, 143 U. S. 517, affirmed.

This case has certainly gone beyond those it affirms. In the latter, statutes of Illinois and New York regulating charges for the storage of grain were held constitutional, but as the statutes were limited in their application to the great grain and commercial centres of Chicago, Buffalo, New York, and Brooklyn, the decisions were based partly upon the fact that in those cities the grain business had become "a practical monopoly to which the citizen was compelled to resort." Mr. Justice Bradley and Mr. Justice Miller who concurred in the judgment in *Munn* v. *Ill.*, so qualified the language in that case. 99 U. S. 700, 747; 118 U. S. 557, 569. The Dakota statute, on the other hand, not only applies to all the warehouses throughout the State but even requires the warehouseman to pay the cost of insurance though it be more than he receives for his whole service. "I am at a loss," remarked Mr. Justice Brewer in his dissenting opinion, "to perceive at what point the fact of monopoly will cease and freedom of business commence, for obviously elevators . . . were as plentiful as other institutions of industry and as easily and cheaply constructed." Field, Jackson, and White, JJ. also dissented.

CONTRACT — RESTRAINT OF TRADE. — *Held*, A combination of a number of brewers to enable the members who have entered into it to control the price of beer within the city, is illegal, being in restraint of trade. *Nester* v. *Continental Brewing Co.*, 29 Atl. Rep. 102 (Pa.).

This result has been reached almost invariably where an agreement has tended to raise prices, destroy competition, or create a monopoly. *Central Shade Roller Co.* v. *Cushman*, 143 Mass. 353, goes farthest of any case in supporting such a combination. It is possible to distinguish that case from the principal case, in that the restraint of trade there was not for an article of prime necessity or a staple of commerce, while in the principal case, assuming that beer is not an article of prime necessity, the court treats it as a staple of commerce, since it is an article of daily consumption.

COPYRIGHT IN PAINTINGS, — INFRINGEMENT OF BY LIVING PICTURES — Act. 25 and 26 Vict. c. 68, s. 1, provides that the author of every original painting shall have "the exclusive right of copying, engraving, reproducing and multiplying such painting and the design thereof by any means, and of any size for the term of his natural life." *Held*, the representation of a picture by a *tableau vivant*, formed by grouping in the same way as in the picture, living persons dressed in the same way and placed in the same attitudes as the figures in the picture, is not an infringement of copyright. *Hauf staengl* v. *Empire Palace* L. R, [1894] 2 Chan Div. 1.

The decision is put on the ground that the Copyright Act was intended "to restrain people from producing something which would compete in the market with the originals or with authorized copies of them." The question of the painted canvas backgrounds of the "living pictures" which were exact copies of the backgrounds of the originals, was expressly left open by agreement. It would seem, however, to be decided by the remarks quoted above.

Sketches of the *tableaux vivants* were published in the "Daily Graphic," and the author of the originals sought to restrain the "Graphic" from publishing them, but an injunction was refused. 29 Law Journal, 369. The court said, "The sketches were not calculated to interfere either with the artist's reputation or with the commercial value of his work."

CRIMINAL LAW — CARRYING CONCEALED WEAPONS. — *Held* (overruling the decision in *State* v. *Harrison*, 93 N. C. 605), that one who carries a concealed weapon for the purposes of sale is guilty under the statute against carrying concealed weapons, the criminal intent in such cases being the intent to carry the weapon concealed, not an intent to do any damage with it. *State* v. *Dixon*, 19 S. E. Rep. 364 (N. C.).

The courts of North Carolina seem now to have reached the true interpretation of their statute against carrying concealed weapons. The trial judge said truly: "That if one could borrow or procure a pistol to sell, or convey it about for several months trying to sell it, and shooting some five times on a picnic occasion, the statute would be a dead letter"

DAMAGES — RAILWAY ACCIDENT — INSANITY. — Where a passenger on a railway is made insane by the excitement of a collision but is uninjured bodily, the company is not liable therefor, as such insanity is not a natural and probable result of the accident. *Haile's Curator* v. *Texas & P. Ry. Co.*, 60 Fed. Rep. 557 (La.).

As long as *Schæffer* v. *Ry.*, 105 U. S 249, remains good law in the United States courts such decisions as this are necessitated by authority. It is very doubtful, however, if in either of these cases the court were warranted in assuming without reference to a jury that insanity was not a natural and probable result of a railway accident. Loss of power, whether mental or physical, would seem a legitimate item in damages; and

the fact that cases of this kind do occur and are litigated in the courts would seem to imply that resultant insanity from the shock is a more or less probable result of a collision.

ELECTION — VALIDITY — EFFECT OF ILLEGAL APPOINTMENT OF BALLOT CLERKS. — The election law requires the appointment by the commissioner of elections of two ballot clerks of opposite political parties. Where the commissioner acting without fraud appointed two extra clerks who helped the voters prepare their ballots, *held*, that the statute is directory not mandatory, and that no irregularities on the part of the election officers will vitiate an otherwise legal election unless it be shown that the result thereof was changed or rendered so uncertain as to make it impossible to obtain the true result. That the will of the people expressed at the polls must not be set aside because their officers acted informally. Brannon, J. *dissenting*. It is impossible to prove that ballots were altered and the result of the election changed. To require such proof is to nullify the statute. Elections are legal only when held in accordance with the statute, and when the statute is, as here, violated in an important particular they should be set aside. *Dial* v. *Hollandsworth*, 19 S. E. 557 (West Virginia).

EQUITY JURISDICTION — FAILURE OF HUSBAND TO SUPPORT WIFE — ADVANCES BY THIRD PERSON.— A husband deserted his wife without making any provision for her support Plaintiff advanced money to her for the purchase of necessaries. *Held*, an equitable debt is created and plaintiff may recover the money so advanced by suit in equity. (*Leuppie* v. *Osborn's Ex'rs*, 29 Atl. Rep. 433 (N. J.).

The court follow the principles laid down in *Kenyon* v. *Farris*, 47 Conn. 510. Compare also Keener on Quasi Contracts, 341–353.

EQUITY JURISDICTION — SPECIFIC PERFORMANCE OF CONTRACTS.— The court will not degree specific performance of negative covenants by an actress, in a contract with a manager when the object is indirectly to secure performance of the affirmative covenants. *Lumley* v. *Wagner*, 1 De G. M. & G. 604; denied,) *Rice* v. *D'Arville*, Boston Transcript, Sept. 29, 1894, Mass., Suffolk Equity Session,—Holmes, J.

See NOTES.

EVIDENCE — NEGLIGENCE — ALTERATION AFTER ACCIDENT.— As evidence that an accident on defendant's railroad was caused by its negligence in maintaining an unsuitable switch, plaintiff offered to show that after the accident defendant removed the switch and replaced it by one of another kind. *Held*, inadmissible evidence (overruling *Martin* v. *Towle*, 59 N. H. 31). *Aldrich* v. *Concord and Montreal R. R.* 29 Atl. Rep. 408 (N. H.).

New Hampshire, by adopting this rule of exclusion of evidence, has come into line with the great weight of authority. This is the rule in England, *Hart* v. *R .R. Co.* 21 L. T. (N. S) 261, as well as in the United States Supreme Court, *R. R. Co.* v. *Hawthorne*, 144 U. S. 202. Pennsylvania and Kansas are probably the only States which now hold the contrary view.

EVIDENCE — PAROL — CONDITIONAL — DELIVERY OF SEALED INSTRUMENT.— Delivery of an instrument to a party thereto, when not relating to real estate, may be shown to have been given on a parol condition that it should not take effect until the happening or doing of something, although the instrument be under seal, at least where the seal is not required for its validity. *Blewitt* v. *Boorum et al.*, 37 N. E. Rep. 119 (N. Y.).

This case is the first which brings up in New York the question whether the fact of there being a seal on the instrument is sufficient to prevent the introduction of evidence as to the condition attached to the delivery. The case does not decide more than that where the seal is superfluous,— is not necessary for the validity of the instrument, — the evidence is admissible. The court, however, intimate strongly that it should be admitted also in cases where the seal is necessary, the basis of the opinion being that such evidence is not introduced to vary the writing, but to show that no agreement ever existed. A clear distinction is drawn between such instruments as the one in the principal case and those involving real estate, in regard to which the law in New York is settled that a conditional delivery cannot be made to the grantee, but to be valid as an escrow it must be made to some third person. *Braman* v. *Bingham*, 26 N. Y. 483; *Wallace* v. *Berdell*, 97 N. Y. 13. The decision in the principle case follows the English rule. *Bowker* v. *Burdekin*, 11 M. & W. 127; *Gudgen* v. *Bessett*, 6 El. & Bl. 986.

JUDGMENT — JOINT CONTRACTOR.— An unsatisfied judgment against one joint contractor on a check given by him alone for the joint debt, is not a bar to an action against the other joint contractor on the original agreement The defendant and T. jointly guaranteed the payment of a third party's rent. The rent being in arrear T. gave the plaintiff his check for the amount. The plaintiff sued T. on the check and

recovered judgment which was not satisfied. The plaintiff then sued the defendant on the original guarantee. *Held*, that the causes of action upon the check and upon the guarantee were not the same, and that the judgment against T. afforded no defence to the action. (*Drake* v. *Mitchell*, 3 East, 251, followed; *Cambefort* v. *Chapman*, L. R. 19 Q. B. D 229, disapproved.) *Wegg Prosser* v. *Evans*, L. R. [1894], 2 Q. B. 101. Wills, J., in his opinion goes carefully over the authorities and comes to the conclusion that *Drake* v. *Mitchell*, and *Cambefort* v. *Chapman*, decided opposite ways, cannot be distinguished from the principle case or from each other, although the court in deciding the latter case had attempted to distinguish it from *Drake* v. *Mitchell*. He therefore follows the earlier case, which has been treated as law without disapproval until the decision of *Cambefort* v. *Chapman*.

MORTGAGE — FORECLOSURE — STATUTE OF LIMITATION. — In an action to foreclose a mortgage where the plea was the statute of limitations, *held*, that an action to foreclose is an action on a specialty and not an action for the recovery of title or possession of real estate, since its purpose was not to give the mortgagee title or possession, but to have the land sold and the proceeds used in payment of the debt. *Kerr* v. *Lydecker*, 37 N. E. Rep. 267 (Ohio).

The above seems to be the rule in a few States, — California, Texas, Iowa, and Illinois. But the general rule is the other way, that the period of limitation for mortgages is the same as for any claim to lands where some one has held the lands adversely. This seems right on principle, as the title is in the mortgagee, and, that being so, the same limitation should apply as in an ordinary case.

PROMOTERS OF CORPORATIONS — INTEREST IN SALE TO COMPANY. — An owner of patents and a promoter made a secret agreement that the latter should form a stock company to purchase the patents and manufacture under them, and that the patentee should pay the promoter one-half the price received. *Held*, the company may recover from the promoter his secret profits. The grounds of liability are two: (1) that he promoter stands in a fiduciary relation to the company, (2) fraud, in not making full disclosure to the company of his relations with the property which is the subject of the deal. *Yale Gas-Stove Co* v. *Wilcox et ux*, 29 Atl. Rep. 303 (Conn.).

The decision is not that a promoter may not form a company to buy something in which he is interested, but only that, if he does so, he must make the directors of the company aware that he has an interest. The case where a promoter buys the thing outright from the owner, and then forms a company and sells it at an advance, is distinguishable, for there no part of the purchase-money paid to the original owner comes out of the company.

QUASI-CONTRACTS — RECOVERY OF MONEY USED BY THIRD PERSON TO COVER DEFALCATION. — Defendant's manager, who had no authority to borrow money or to overdraw defendants' bank account, borrowed money of plaintiff, giving a check signed in his name by procuration for defendants. The manager had overdrawn defendants' account and borrowed the money for his own purposes to replace money of defendants which he had abstracted, paid the money into defendants' account at their bank, and used it to pay the wages of defendants' workmen. *Held*, as the money had found its way into defendants' possession and been employed for their benefit, it was money received to the use of plaintiff, who is entitled to recover though defendants did not know of the borrowing. *Reid* v. *Rigby & Co.*, I. R. (1894) 2 Q. B. 40.

The case is obscure as to whether the manager actually used the money so borrowed to replace the money abstracted by him. It would seem that he did. If this is so, it is submitted that plaintiff should not recover. The manager used the borrowed money to pay a debt of his, *i. e.*, defendants' claim against him for the money abstracted, and plaintiff can follow it no further since defendants took it in payment of a legal claim. What defendants did with it after so receiving it is not material. In *Craft* v. *South Boston R. R.*, 150 Mass. 207, the treasurer of a corporation obtained money from the plaintiff by false pretences and used it to cover up his defalcations, by paying debts of the corporation. In an action for money had and received, a recovery was not allowed. That case seems to be similar to the one under discussion. See also in this connection 33 Cal. 134, p. 147, and Keener on Quasi-Contracts, 330-334. Neither in this case nor in *Craft* v. *South Boston R. R.* does the question seem to have been raised whether the guilty knowledge of the agent in receiving the money to be regarded in law as the knowledge of the principal. On this point see *Atlantic Mills* v. *Indian Orchard Mills*, 147 Mass. 268, 273.

REAL PROPERTY — COVENANTS RUNNING WITH THE LAND — PRIVITY OF ESTATE. — Land was conveyed to a wife separately, who occupied it, while the husband had possession. Under these circumstances the husband covenanted merely as to his

wife's seisin. *Held*, that the husband was liable to a subsequent grantee of the wife's on their covenant of warranty. *Mygatt et al.* v. *Coe*, 36 N. E. Rep. 870 (N. Y.).

In nearly all jurisdictions not already bound by authority, the law is in line with the principal case. In this country, at least, common sense required a departure from the doctrine of *Noke* v. *Awder*. In New York, in 1830, *Beddoe* v. *Wadsworth*, 21 Wend. 120, held that if the grantor was in possession under a claim of title the covenant would run with the land. The furthest point actually decided is in *Wead* v. *Larkin*, 54 Ill. 489 (see also 60 Vt. 94), which held that possession in the original covenantor was not necessary, but that if the covenantee gets possession before he assigns, the covenant will run with the land. It would seem that having gone so far a further step would necessarily follow, and that, disregarding the question of possession in either the covenantor or the covenantee, the only possession necessary to make the covenant run should be that of the subsequent assignee who sues. It would seem that in Massachusetts the old doctrine would still be followed. *Slater* v. *Rawson*, 6 Met. 439. For a valuable discussion of this point see Rawle on Covenants for Title, 5th ed., §§ 232–236.

REAL PROPERTY — LEASE — CONDITIONS. — The lease contained a covenant not to underlet or assign without lessor's license, and by the terms of the lease the lessor could re-enter for breach of any covenants. The lessor gave a license to the lessee to assign his term to a certain person, but stated in it that no further assignment should be made without his (lessor's) license. The assignee agreed with the assignor to conform to the terms of the lease. The assignee assigns to defendant without the lessor's license and the latter brings an action to recover possession. *Held*, the assignee was bound by the covenant and condition and lessor can recover. *Kew* v. *Trainor*, 37 N. E. Rep. 223 (Ill.).

This decision takes much that is objectionable out of the rule laid down in *Dumpor's Case*, 4 Co. 119 b. If the lessor can, by expressly stating in his license that it applies only to the one assignment, avoid the application of the rule, such a course will always be adopted by lessors and the rule will never take effect.

REAL PROPERTY — PARTY WALLS — ADDITIONS WHOLLY ON LAND OF ONE OWNER. — Plaintiffs and defendant own adjoining pieces of land. In the deeds to plaintiffs' and defendant's predecessors from the city of Boston, which originally owned both pieces of land, are provisions that "the owner of the premises conveyed may build one-half of the division wall on the adjoining lots, which half, when used by the owners of the adjoining lots for building purposes, is to be paid for by them to the extent so used." Plaintiffs, after acquiring their land, wished to build a higher block, and strengthened the wall on their side, as well as building it up. Defendant made use of the wall in increasing the height of his own block, and now plaintiffs seek to recover not only for the use of the old party wall as carried up, but also for the additions in thickening and strengthening it. *Held*, plaintiffs can recover only for the use of the old party wall as carried up. *Walker et al.* v. *Stetson*, 38 N. E. 18 (Mass.). See NOTES.

REAL PROPERTY — PRESCRIPTION — NUISANCE. — Bill by the Board of Health to abate a nuisance. The defendant carried on the business of fat rendering, which caused noxious odors injurious to the health of the neighbors. The defendant had carried on the business for twenty-eight years, and claimed a right by prescription to continue it. *Held* (following *Com.* v. *Upton*, 6 Gray, 473): 1. Carrying on an offensive trade for twenty years in a place remote from buildings and public roads does not entitle the owner to continue it in the same place after houses have been built and roads laid out, to the occupants of and travellers upon which it is a nuisance, because in such a case there is no adverse use of another's property; 2. No right to prescription can be obtained against the public. *Board of Health of North Brunswick* v. *Lederer et al.*, 29 Atl. Rep. 444 (N. J.).

The decision follows the weight of authority in America and England.

REAL PROPERTY — RIPARIAN RIGHTS. — "RELICTION." — *Held*, that land formed by the gradual and imperceptible receding of the Missouri River belongs to the riparian owner. *Gill* v. *Lydick et al.*, 59 N. W. Rep. 104 (Neb.). See NOTES.

REAL PROPERTY — RIPARIAN RIGHTS — ALLUVION. — *Held*, that riparian owner must stand the loss caused by the gradual abrasion of the Missouri River, but that he still owned the land separated from the remainder of his tract by a sudden change of the river's course. *Bouvier* v. *Stricklett*, 59 N. W. Rep. 550 (Neb.). See NOTES.

TENANTS IN COMMON — RIGHT OF NON-OCCUPYING TENANT IN COMMON TO RECOVER FOR USE AND OCCUPATION. — One tenant in common allowed the other to occupy the whole property with no agreement, and now brings assumpsit for use and

occupation. *Held*, he can recover (Carpenter and Smith, JJ. *dissenting*). *Gage* v. *Gage*, 29 Atl. Rep. 543 (N. H.); s. c. 66 N. H. 282.

This decision is contrary to several *dicta* in New Hampshire, — *Berry* v. *Whidden*, 62 N. H. 473, and at least one decision, — *Webster* v. *Calef*, 47 N. H. 289; but brings New Hampshire in line with the general rule, usually laid down by statute, however, — Stimson's American Statute Law, § 1378. The courts, as a rule, have refused to decide this question as the majority of this court has had the courage to do, but have adhered to the old common-law doctrine that one tenant in common could not sue another for a division of the profits if the latter has had more than his share. By various American and English statutes, this old view has been done away with, so that this case was about the only one unprovided for, — *i.e.*, the case where one tenant allows the other to occupy all. There seems to be no reason, apart from the historical one, why such an action should not be allowed.

But whatever view may be taken of the result reached in this case, there can be no doubt as to the ability and vigor of the dissenting opinion, in which Carpenter, J. contends that judges have no right to "make law." However jurists may differ as to this last proposition, one thing is clear, that if judges *are* to legislate, they should do so openly, and not "under cover of vague and indeterminate phrases."

TORTS — MALICIOUS DIVERSION OF WATER. — The defendant intentionally so drained a marsh on his land as to divert the water from the plaintiff's land, where it was used for irrigation. *Held*, that since the action was intentionally injurious to the plaintiff, it is immaterial whether a stream or only percolating waters were diverted, the defendant being liable in either case. *Bartlett* v. *O'Connor*, 36 Pac. Rep. 513 (Cal.).

This decision is a too hasty disposal of a troublesome question, since it is apparently the first case in California on the point at issue. The court dub the defendant's act "malicious injury," and give the case no further consideration, not citing a single case in support of the conclusion reached. Yet the weight of authority is against the proposition laid down — that a lawful act upon one's own land may become unlawful by reason of an improper motive. It is, perhaps, fair to say, however, that the tendency of the courts is to extend liability for purely malicious acts which would not be unlawful if done without the sole intent to injure.

TORTS — TRESPASS — INJURY TO CATTLE BY EATING OF POISONOUS TREE WHOLLY WITHIN NEIGHBOR'S BOUNDARY. — Plaintiff and defendant were adjoining proprietors, their estates being separated by a ditch and a fence. Both the ditch and the fence were on the defendant's land. The plaintiff's property abutted on the ditch, on the other side of which, and some feet within the defendant's boundary, ran the fence. Inside the fence, on the defendant's land, grew a yew tree, the branches of which overhung the ditch, but no part of which extended to the plaintiff's boundary. There was no obligation on either side to fence. The plaintiff's horse ate of the branches of the tree and died therefrom. In an action to recover the value of the horse, *held*, that the defendants are not liable, as there is no duty on them to prevent their neighbors' animals from having access to the tree. *Ponting* v. *Noakes et al.*, L. R. [1894], 2 Q. B. 281.

No other decision was possible on the facts. If the defendant had been under obligation to fence, and from neglect of this the injury had happened, the plaintiff could have recovered. *Lawrence* v. *Jenkins*, L. R. 8 Q. B. 274. But the horse in this case is a trespasser, and the defendant is under no liability to keep his premises in safe condition for trespassing animals, provided he does not wilfully entice them to their destruction. *Jordin* v. *Crump*, 8 M. & W. 782. The plaintiff endeavors to bring his case within the authority of *Fletcher* v. *Rylands*, but the court disposes of the point by observing that the authority of that case is applicable only when some dangerous substance escapes from the defendant's land, while in the main case it is admitted that the poisonous branches were wholly within the defendant's boundaries.

TROVER — PASSING TITLE BY JUDGMENT. — Plaintiff recovered judgment in trover in Connecticut. Failing of satisfaction, she bought replevin in Massachusetts. *Held*, by a divided court, four judges against three, that the action could be maintained. Title does not pass to defendant in trover until satisfaction of judgment. *Miller* v. *Hyde*, 37 N. E. Rep. 760 (Mass.). See NOTES.

TRUSTS — CAN A MURDERER ACQUIRE TITLE BY HIS CRIME? — A. murdered his daughter, obtained her property by descent, and sold to the defendants, who had notice of his crime when they bought. *Held*, that they acquired a good title. *Shellenberger* v. *Ransom*, 59 N. W. R. 935 (Nebraska), reversing s. c. 47 N. W. R. 700. See NOTES.

TRUSTS — DEPOSIT OF CHECK FOR COLLECTION. — The plaintiff deposited in bank A. a check payable to his order indorsed "for deposit to the credit" of the

payee. Without further arrangement the plaintiff was credited with the amount, and bank A. was in turn credited by its correspondent bank B. Before the check was paid by bank C. on which it was drawn, bank A. became insolvent, its account with bank B. at the time being overdrawn. *Held*, as the plaintiff was credited with the deposit against which he might have drawn, the property in the check vested in bank A., and therefore a perfect title was conferred upon bank B. *Ditch et al.* v. *Western Nat. Bk.*, 29 Atl. Rep. 72, 138 (Md.).

It is submitted that the dissenting opinion is by far the better one. The indorsement on the check "for deposit to the credit of" the payee was notice to bank B. that bank A. held the check in trust for the purpose of collecting the proceeds and depositing them to the credit of the plaintiff. Such an indorsement is not absolute, and does not pass the beneficial interest in the check till it is paid. Bank B. was simply in the position of a sub-trustee. The fact that the depositor is credited with the amount, and allowed to draw against it, is a mere gratuitous privilege, and not conclusive evidence that title passes absolutely. If the check had been dishonored, the plaintiff would have unquestionably been charged. Ames Cases on Trust, pp. 11, 17; Daniel on Neg. Instr. (4th ed.), § 340 *a*, *et seq.*

WILLS — WITNESSES — COMPETENCY. — The husband of one legatee and the wife of another were attesting witnesses. The question was whether the statute, which declares that "any beneficial devise, legacy, or interest" to a subscribing witness is void, renders the legacies to the wife and husband of the subscribing witnesses void, and leaves the will good, or renders the whole will bad. *Held*, the whole will is bad. *Fisher* v. *Spence*, 37 N. E. Rep. 314 (Ill.).

This is a case of first impression in this jurisdiction, and the matter is well discussed. The court recognizes that there are two sides to the question, and prefers to adopt the Massachusetts view. *Sullivan* v. *Sullivan*, 106 Mass. 474. This view, of course, is obtainable by strict construction of the statute; but the contrary doctrine, which obtains in New York and Maine (*Jackson* v. *Wood*, 1 Johns. 163; *Winslow* v. *Kimball*, 25 Me. 493), appeals to one's common sense to so great an extent that it seems odd a court, not bound by precedent, would refuse to adopt it.

REVIEWS.

A TREATISE ON THE LAW OF RES JUDICATA, INCLUDING THE DOCTRINES OF JURISDICTION, BAR BY SUIT, AND LIS PENDENS. By Hukm Chand, M. A. London: William Clowes and Sons; Edinburgh: William Green and Sons. 1894.

A principal object of the author of this interesting treatise (who is Chief Judge of the City Court and member of the Legislative Council of Hyderabad, Deccan), is "to show the great advantage to the administration of justice, of the knowledge of contemporary laws and decisions in other countries." This object has been most faithfully and successfully carried out. An enormous mass of authority has been intelligently gathered from the reports and from approved text-writers of England and the United States, as well as from the states of British India; and the advantage thereby gained is surely no slight one. Four thousand cases are cited on this rather narrow branch of the law, of which more than half appear to be American cases.

In order to effect his design of making the Indian and American cases known in each other's courts, the author has stated the facts more fully than is usual in books of the sort, and has given many well-chosen extracts from the opinions of the courts. The result is a mass of material almost bewildering in amount. One realizes as never before the extent of sway of the English law. The House of Lords, Texas, and Allahabad jostle one another in the foot-notes, while Hindoo widows, the *Shebait* of